United States District Court For The District of Oregon

District of Oregon

File Number: 6-08-6408-TC

LINDLEY CONTOURS, LLC, and NORMAN LINDLEY,

Plaintiffs,

VS.

NOTICE OF APPEAL

AABB FITNESS HOLDINGS, INC., f/k/a CONTOURS EXPRESS, INC.: **CONTOURS EXPRESS, LLC;** THOMAS D. CHRISTOPOUL; WILLIAM G. HELTON, JR., PAUL M. MCNICOL: **ANDREW RUSSELL;** MAYO S. STUNTZ, JR.; DARREN CARTER; MICHAEL WIDENER; **CLINTON C. COOPER:** MARY SCHRAD, PILOT GROUP LLC, PILOT GROUP L.P., and PGCE, INC.,

Defendants.

Notice is hereby given that Lindley Contours, LLC, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the 9th Circuit from the final judgment entered in this action on the 9th day of June 2009.

> s/W. Michael Garner Attorney for Plaintiffs W. Michael Garner, admitted pro hac vice Dady & Garner, P.A. 5100 IDS Center 80 South 8th Street Minneapolis, MN 55402 Telephone: (612) 359-3515 Facsimile: (612) 359-3507

Email: wmgarner@dadygarner.com

Attorneys for Plaintiffs



USCA DOCKET # (IF KNOW	N)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CIVIL APPEALS DOCKETING STATEMENT

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL:	DISTRICT: OREGON	JUDGE: AIKEN			
	DISTRICT COURT NUMBER: 08-6408-TC				
	DATE NOTICE OF APPEAL FILED: IS THIS A CROSS APPEAL?				
SEE ATTACHED CAPTION	JULY 8, 2009				
	IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):				
BRIEF DESCRIPTION OF NATURE OF ACTION A					
Lindley Contours, LLC, a former franchisee of "Contours Express," a franchisor of women's fitness gyms, seeks recovery from the franchisor for its misrepresentations, violations of franchise laws unfair trade practices, and breaches of contract in connection with the sale of franchises for "Contours Express" women's fitness centers. The U.S. District Court dismissed the case upon Defendant's Motion to Dismiss in favor of arbitration.					
PRINCIPAL ISSUES PROPOSED TO BE RAISED	ON APPEAL:	·			
Whether the lower court erred by dismissing Plaintiff's case when the Defendants engaged in acts inconsistent with any right to arbitrate; when Plaintiffs were prejudiced by those inconsistent acts; when individual Defendants have no right to arbitrate; and when Defendants are legally estopped from compelling arbitration.					
PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS):					
None.					
DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:					
Possibility of Settlement					
Likelihood that intervening precedent will control outcome of appeal Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify)					
Any other information relevant to the inclusion of this case in the Mediation Program					
Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges					

LOWER COURT INFORMATION							
JU:	JURISDICTION		DISTRICT COURT DISPOSITION				
FEDERAL	APPELLATE	TYPE OF JUDGN	MENT/ORDER APPEALED	REL	JEF.		
FEDERAL QUESTION DIVERSITY OTHER (SPECIFY):	FINAL DECISION OF DISTRICT COURT INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): OTHER (SPECIFY):	DISMISSAL SUMMARY JUDGMENT JUDGMENT DECLARAT	JURISDICTION JUDGMENT JUDGMEN JUDGMENT JUD	AWARDED \$ INJUNCTIO PRE PEF GR	850,000 INS: ELIMINARY RMANENT ANTED NIED FEES:		
	CER'	TIFICATION (OF COUNSEL				
I CERTIFY THAT: 1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED. 2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACH. (SEE 9TH CIR. RULE 3-2). 3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25. 4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL. S/W. Michael Garner Signature July 8, 2009 Date					25.		
COUNSEL WHO COMPLETED THIS FORM							
NAME W. MICH	HAEL GARNER, ESQ.						
FIRM DADY & GARNER, P.A.							
ADDRESS 5100 IDS CENTER, 80 SOUTH 8TH STREET							
CITY MINNEAPOLIS		STATE MINNESOTA	ZIP CODE	55402			
E-MAIL wmgarne	wmgarner@dadygarner.com; bjbertram@dadygarner.com			TELEPHONE 612-359-9000			
FAX 612-	359-3507						
THIS DOCUMENT SHOULD BE FILED IN DISTRICT COURT WITH THE NOTICE OF APPEAL. ** **IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS.							

LINDLEY CONTOURS, LLC, and NORMAN LINDLEY,

Plaintiffs,

VS.

FULL CASE TITLE FOR DOCKETING STATEMENT

AABB FITNESS HOLDINGS, INC., f/k/a CONTOURS EXPRESS, INC.; **CONTOURS EXPRESS, LLC;** THOMAS D. CHRISTOPOUL; WILLIAM G. HELTON, JR., PAUL M. MCNICOL; **ANDREW RUSSELL;** MAYO S. STUNTZ, JR.; DARREN CARTER; MICHAEL WIDENER; **CLINTON C. COOPER;** MARY SCHRAD, PILOT GROUP LLC, PILOT GROUP L.P., and PGCE, INC.,

Defendants.

FILED *09 APR 20 16:01 USDC-ORE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LINDLEY CONTOURS, LLC, AND NORMAN LINDLEY,))	
Plaintiffs) }	Civil No. 08-6408-TC
v.	; }	FINDINGS AND RECOMMENDATION
ABBA FITNESS HOLDINGS, INC., f/k/a CONTOURS EXPRESS, INC.,)	
et al.,)	
<u>Defendants</u>	<u>`</u>	

COFFIN, Magistrate Judge:

Presently before the court is defendants' motion (#6) to dismiss for arbitration, or, in the alternative, to dismiss certain defendants for lack of jurisdiction. For the reasons set forth below, this action should be dismissed.

Factual Background

This case arises from a dispute between a franchisee and franchisor. Their business relationship is governed by terms of their franchise agreements which state that disputes shall be determined by binding arbitration. Plaintiff Lindley Contours, LLC, does not dispute the existence or general applicability of the arbitration clause, but contends that it was waived.

Legal Background

Waiver of the right to arbitrate is not favored under the law. Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9 th Cir. 1986). An examination of whether the right to seek arbitration has been waived must be conducted in light of the "strong federal policy favoring enforcement of arbitration agreements." Id. A party arguing that an arbitration agreement was waived bears a "heavy burden." Id.

In order to prove that a party waived its right to compel arbitration, the party opposing the arbitration must demonstrate:

- (1) knowledge of an existing right to compel arbitration;
- (2) acts inconsistent with that existing right; and
- (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.

Id.

Discussion

As discussed in more detail below, plaintiff did not meet its burden of demonstrating that the arbitration agreement has been waived. The first prong of the waiver test is met. However, it is less than clear if the second required prong of the waiver test is met. And it is clear the third required prong of prejudice is not met. Demonstrating prejudice to the party arguing in favor of waiver is "no easy task." Hoffman v. Swift Transp. Co., Inc., Civ.No. 07-321-AS, 2007 WL 4268769 at *2 (D. Or. Nov. 30, 2007).

Plaintiff argues that certain defendants took actions in a prior related action in a state court in Missouri that were inconsistent with their right to arbitrate, see Opposition (#23) at p. 2. Plaintiff also argues that it was prejudiced by such acts.

Defendants cite several persuasive cases where it was held that engaging in litigation prior to asserting arbitration rights did not amount to a waiver of the right to arbitrate. See p.p. 7-12 of Reply(#26). For example, in Britton v. Co-op Banking Group, 916 F.2d 1405, 1413 (9th Cir. 1990) the court did not find prejudice despite two previous years of discovery and motion practice. In Allied v. Systems Co. v. Marinetter Marine Corp., Civ. No. 99-368-ST, 1999 WL 632708 (D. Or. Aug. 20, 1999), the court rejected arguments of waiver despite a full range of litigation activities spanning over 13 months in a prior action. Defendant in the prior action had not asserted the right to arbitration, but instead filed a motion to dismiss, filed discovery requests and took depositions, and filed an answer and counterclaim. The Allied Court rejected an argument that there was prejudice based on the time and resources spent on discovery in the previous case and cited Britton. The Allied Court noted that defendant had done nothing in its second case except file the motion for Such situation is generally similar to the case arbitration. presently before this court - - including the fact that defendants here have only removed this action and filed the present motion regarding arbitration and personal jurisdiction.

It is also noteworthy that the prior claims asserted by Lindley Contours in Missouri did not include claims asserted in this action. Claims asserted in this action, but not in the prior Missouri action,

include claims for violations of the Oregon Franchise Act, common law fraud, negligent misrepresentation, and violations of Oregon's Unlawful Trade Practices Act. Moreover, there are several new defendants in the present action who were not named in the prior Missouri action. Plaintiff conceded at oral argument that these new defendants' personal assets are at risk in the present action. The new defendants did not do anything in the Missouri action, and, as such, they obviously have not acted inconsistently with their arbitration rights in Missouri. Nor have they acted inconsistently with their arbitration rights in the present action. And there can be no prejudice to plaintiff resulting from their lack of inconsistent action in either lawsuit.

Plaintiff did not meet its burden of demonstrating that the arbitration agreement has been waived.

All of plaintiff's other arguments have been considered and found unpersuasive.

Plaintiff cites Hoffman Construction Co. of Oregon v. Active Erectors, 969 F.2d 796 (9th Cir. 1992) and summarizes that case as one in which the "party who litigated in state court waived right to compel arbitration in subsequent action raising a new legal claim based on the same facts in federal court," Opposition(#23) at p. 14. However, Hoffman Constructive Co. is legally and factually distinguishable from the case before this court: Unlike the situation in the present case, the previous related state court case discussed in Hoffman was taken all the way through a lengthy trial, and, moreover, the Hoffman court based its decision on resjudicata. It should also be noted that the case presently before this court has several new defendants and several new claims not in the prior case in Missouri.

^{4 -} FINDINGS AND RECOMMENDATION

Conclusion

Defendants' motion (#6) to dismiss should be allowed and this action should be dismissed.

_ day of April, 2009.

United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LINDLEY CONTOURS, LLC, AND, NORMAN LINDLEY,

ORDER

Civ. No. 08-6408-TC

Plaintiffs,

vs.

б

ABBA FITNESS HOLDINGS, INC., f/k/a CONTOURS EXPRESS, INC., et al.,

Defendants.

AIKEN, Judge:

Magistrate Judge Coffin filed his Findings and Recommendation on April 20, 2009. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiffs have timely filed objections. I have, therefore, given the file of this case a <u>de novo</u> review. I ADOPT the

1 - ORDER

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

LINDLEY CONTOURS, LLC, and NORMAN LINDLEY,

Plaintiffs,

v.

Civil No. 08-6408-TC

AABB FITNESS HOLDINGS, INC., f/k/a CONTOURS EXPRESS, INC., et al,

Defendants.

JUDGMENT

This action is dismissed.

Dated: June 11, 2009.

MARY L. MORAN, ACTING CLERK OF COURT

Leslie Engdall, Deput

DOCUMENT NO: _____

JUDGMENT

REPRESENTATION STATEMENT

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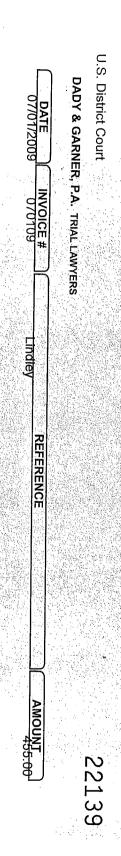
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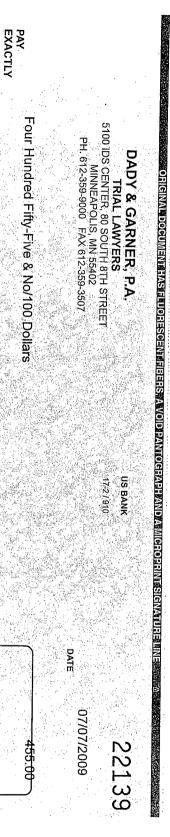
ATTORNEYS FOR DEFENDANTS

TO THE ORDER OF

U.S. District Court for the District of Oregon

(JIVI) Case No: 6-08-6408-TC





AUTHØRIZED SIGNATURE

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